U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

File: WAC 99 213 52356 Office: California Service Center Date: MAR 2 0 2000

IN RE: Petitioner [redacted]
Beneficiary

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(iii)

IN BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an international travel agency and tour operator. It seeks classification of the beneficiary as an international tour coordinator trainee for a period of one year and ten months. The director decided that the beneficiary already possessed substantial training and expertise in the proposed field of training. The director also decided that the petitioner did not establish that the beneficiary will not engage in productive employment. The director determined that the petitioner does not have the physical premises and enough sufficiently trained manpower to provide the training specified.

On appeal, counsel states that the beneficiary is not required to have any involvement in the petitioner's daily course of business. Counsel also states that Service's inference that the beneficiary already gained extensive training and practical training is inaccurate. Counsel contends that the Service approved the same program that was provided for at least two other trainees.

Section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(iii), provides classification to an alien having a residence in a foreign country which he or she has no intention of abandoning who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment.

The regulation at 8 C.F.R. 214.2(h)(7) states, in pertinent part:

> (ii) *Evidence required for petition involving alien trainee--*(A) *Conditions.* The petitioner is required to demonstrate that:
>
> (1) The proposed training is not available in the alien's own country;
>
> (2) The beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed;
>
> (3) The beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and
>
> (4) The training will benefit the beneficiary in pursuing a career outside the United States.

(B) *Description of training program.* Each petition for a trainee must include a statement which:

(1) Describes the type of training and supervision to be given, and the structure of the training program;

(2) Sets forth the proportion of time that will be devoted to productive employment;

(3) Shows the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training;

(4) Describes the career abroad for which the training will prepare the alien;

(5) Indicates the reasons why such training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States; and

(6) Indicates the source of any remuneration received by the trainee and any benefit which will accrue to the petitioner for providing the training.

(iii) *Restrictions on training program for alien trainee.* A training program may not be approved which:

(A) Deals in generalities with no fixed schedule, objectives, or means of evaluation;

(B) Is incompatible with the nature of the petitioner's business or enterprise;

(C) Is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training;

(D) Is in a field in which it is unlikely that the knowledge or skill will be used outside the United States;

(E) Will result in productive employment beyond that which is incidental and necessary to the training;

(F) Is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States;

(G) Does not establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified; or

(H) Is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student.

Counsel states on appeal that the petitioner's president and vice president will be providing the in-class instructional training. The petitioner's computer analyst will be providing the training for the computer programs. The training program requires 22 months for completion. The petitioner has not explained how its three employees will be responsible for training the beneficiary from 9AM until 6PM and still be able to perform their duties as executives of the company. Further, the petitioner has not established that the physical premises are suitable for training.

The beneficiary entered the United States as a student (F-1) to attend [redacted] She completed an advanced certificate and Associate Degree in the travel/tourism program in 1998. She was authorized practical training from August 13, 1998 until August 12, 1999. Absent a transcript of the beneficiary's college coursework and a description of the beneficiary's practical training, counsel's assertion that the training program compensates for what was not covered in the beneficiary's AA program and one year related practical training cannot be taken into consideration. The assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). The beneficiary appears to already have substantial training and expertise in the proposed field of training.

Further, the beneficiary would be trained in different aspects of international tour coordination from 9AM until 6PM, with practical training from 11AM until 4PM. Some of the practical training involves productive employment such as the beneficiary making reservations and confirmations of airlines, hotels and land tours for customers, creating tour itineraries, training new staff, utilizing computer reservation confirmation systems, delegating duties to other tour staff, determining legal elements and obligations in contracts and agreements, etc. The beneficiary would also receive a salary of $360 per week. The petitioner has not demonstrated that the beneficiary will not be engaged in productive employment beyond that necessary and incidental to the training. The petitioner has not shown that the beneficiary is not involved in the petitioner's daily business operations.

Counsel states on appeal that the Service previously approved an H-3 petition based on identical information. However, an unpublished decision has no precedential effect as would a published decision and is not binding on the Service. See 8 C.F.R. 103.3(c). The approval to which counsel refers was apparently a matter of Service error.

Beyond the decision of the director, this case cannot be approved for another reason. The petitioner has not shown that the training program is not designed to extend the total allowable period of practical training previously authorized a nonimmigrant student. The beneficiary was previously authorized practical training from August 13, 1998 until August 12, 1999.

Further, the beneficiary may not be classified as a nonimmigrant trainee, in the absence of a showing that the training is not available in his or her own country and that the purported training is not essentially experience in repetition, review, and practical application of skills. See Matter of Frigon, 18 I&N Dec. 164 (Comm. 1981). No evidence has been presented that such training does not exist in the beneficiary's home country.

In nonimmigrant visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.